



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-03624

Dear Ms. Folsom:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 480332 (Houston GC No. 20180).

The City of Houston (the "city") received a request for all correspondence between members of the mayor's staff and employees of the city's Department of Administration & Regulatory Affairs ("ARA") since January 1, 2012 and "all documents produced in connection with any and all investigations" of a named employee or any ARA employees by the city's Office of the Inspector General (the "OIG") for the same period. You state the city will release some of the requested information but claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-11915 (2012). In Open Records Letter No. 2012-11915, we determined the city must withhold the requested information at issue under section 552.101 of the

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Government Code in conjunction with common-law privacy. You state the law, facts, and circumstances on which the prior ruling was based have not changed. Accordingly, the city must continue to rely on Open Records Letter No. 2012-11915 as a previous determination and withhold the requested information at issue in accordance with that ruling.

We next note some of the information you have submitted to us for review is not responsive to the request for information because it was created after the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

We next note the submitted information contains copies of statutes and city ordinances that you seek to withhold from release under section 552.107 of the Government Code. In Open Records Decision No. 551 (1990), this office considered whether a city ordinance could be withheld from the public under the Act, stating:

It is difficult to conceive of a more open record. The law, binding upon every citizen, is free for publication to all. *Banks v. Manchester*, 128 U.S. 244, 253 (1888). This policy is based on the concept of due process which requires that the people have notice of the law. *Building Officials & Code Admin. v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980). Given this constitutional consideration, it is difficult to hypothesize a circumstance that would bring a law or ordinance within an exception to public disclosure.

Thus, the city may not withhold the statutes and city ordinances under section 552.107. Accordingly, the city must release this information, which we have marked.

The submitted information also contains a portion of an agenda of a public meeting. The agendas and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See Gov't Code* §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under section 552.107, the exceptions to disclosure found in the Act generally do not apply to information that other statutes make public. *See Open Records Decision* Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the city must release the submitted agenda of a public meeting, which we have marked, pursuant to section 551.022 of the Government Code.

The submitted information also contains financial disclosure statements that, by city ordinance, are records available to the public in their entirety. Section 18-22 of the city's Code of Ordinances provides the following:

All financial disclosure statements required by this article shall be sworn and shall constitute public records. The city secretary shall maintain such statements in a manner that is accessible to the public during regular business hours.

Houston Code of Ordinances § 18-22. We note the city, as a home-rule city, is empowered to enact ordinances governing matters of local concern. The city has made a legislative determination that public confidence in their elected city officials and executive level employees is enhanced by the public's knowledge that these city officials are not engaged in conflicts of interest. We have concluded previously a home-rule city is authorized to require city officials to file financial disclosure statements, so long as the disclosure ordinance is not inconsistent with the city's charter or state law. *See* Attorney General Opinion H-969 (1977). Therefore, any ordinance that conflicts with the Act would be of no effect. *See* Attorney General Opinion H-1070 at 5 (1977); Open Records Decision Nos. 594 at 2-3 (1991) (city ordinance cannot operate to make information confidential when not excepted by Open Records Act), 263 at 2 (1981) (city ordinance may not conflict with Open Records Act); *see also Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (agency rule may not make information confidential in circumvention of Open Records Act).

The Act provides public information in the possession of a governmental body must be made available to the public unless it is excepted from disclosure. Gov't Code §§ 552.007, 552.021. Two such exceptions are sections 552.107 and 552.117 of the Government Code.² Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Section 552.107(1) is a discretionary exception that may be waived by a governmental body. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is a mandatory exception that protects

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

information that a governmental body is prohibited from releasing subject to criminal prosecution. *Id.* §§ 552.007, 552.352; see Open Records Decision Nos. 455 (1987), 344 (1982), 325 (1982). Therefore, we must consider whether the city must release information pursuant to a city ordinance when the information is also excepted from release under the Act.

Because the city's ordinance may conflict with the requirements of the Act, we must examine whether section 18-22 has been preempted by either section 552.107 or 552.117 of the Government Code. See ORDs 594 at 2-3, 263 at 2. We recognize home-rule cities have broad discretionary powers, provided no ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5; *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993). Home-rule cities possess the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power. *Dallas Merchant's & Concessionaire's Ass'n v. City*, 852 S.W.2d at 490-91. An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute. *Id.* at 491; see *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). However, "the mere fact that the legislature has enacted a law addressing a subject does not mean the complete subject matter is completely preempted." *Dallas Merchant's & Concessionaire's Ass'n*, 852 S.W.2d at 491; *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990). "[A] general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *Dallas Merchant's & Concessionaire's Ass'n*, 852 S.W.2d at 491; *City of Beaumont v. Fall*, 291 S.W. 202, 206 (1927). "Thus, if the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with unmistakable clarity." *Dallas Merchant's & Concessionaire's Ass'n*, 852 S.W.2d at 491; see *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964).

In this instance, however, we need not determine whether section 552.107 preempts the city's disclosure ordinance because we do not believe that the two provisions conflict. Attorney General Opinion H-1070 at 5 (1977). As we previously stated, section 552.107 is a discretionary exception that the city may waive. By enacting the ordinances at issue, the city has determined the public has an interest in this type of financial information. Thus, we find the city has chosen to waive the applicability of section 552.107 to its financial disclosure statements. Moreover, once the city has made nonconfidential information available to the public, it must release the information to any other member of the public and may not subsequently withhold the information under a discretionary exception. Gov't Code § 552.007 (once entity voluntarily makes nonconfidential information available to public, it must be made available to any person).

Release of information within the statements revealing a city employee's home address and whether the employee has family members, however, presents a conflict between application

of the city's ordinance and section 552.117 of the Government Code. The Legislature, by enacting section 552.117, meant to protect from required public disclosure the home addresses, telephone numbers, emergency contact information, social security numbers, and information revealing whether a public employee or official has family members when the employees or officials request this information be kept confidential under section 552.024 of the Government Code. We find the Legislature has with unmistakable clarity required governmental bodies to withhold a public employee's home address and information revealing whether the employee has family members when the employee has requested this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (*citing* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1986)). *But see* Open Records Decision No. 516 (1989) (governmental body may not invoke section 552.117 to withhold information when another governmental body is expressly authorized to obtain it).

Because section 18-22 of the city's Code of Ordinances would mandate the release of this information when contained on the required financial disclosure statement, the ordinance conflicts with section 552.117 of the Government Code. Release under the ordinance would deprive city employees certain protections granted them by the Legislature. Therefore, we believe the ordinance to be unenforceable to the extent it conflicts with section 552.117 of the Government Code. *See Dallas Merchant's & Concessionaire's Ass'n*, 852 S.W.2d at 491; ORDs 594 at 3, 263 at 2. Consequently, the city must redact any information on the financial disclosure reports that reveals the employee's home address and whether he has family members if he has requested this information be kept confidential under section 552.024 of the Government Code prior to the date on which the request for this information was made. The remaining information in the financial disclosure reports, which we have marked, must be released.

Exhibits 2, 4, and 5 and portions of Exhibit 6 are subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Although you assert this information is excepted from disclosure under section 552.107, section 552.107 is a discretionary exception to disclosure that protects the governmental body's interests and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the district may not withhold this information under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under Texas Rule of Evidence 503 for the information subject to section 552.022.

Rule 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state pursuant to City of Houston Executive Order 1-39 (Revised), the OIG is a division of the Office of the City Attorney and acts under that office's supervision. You inform us the information subject to section 552.022 consists of communications between employees of the OIG in their capacities as attorneys and attorney representatives, and employees of the city in their capacities as clients and client representatives. You explain the information was created in furtherance of the rendition of professional legal services to the city. You state the information at issue was not intended for release to third parties, and you state the city has maintained the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to this information. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the city may withhold Exhibits 2, 4, and 5 and the portions of Exhibit 6 we have marked, which are subject to section 552.022, pursuant to Texas Rule of Evidence 503.

You claim Exhibits 3 and 7 and the remaining information in Exhibit 6 are excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) also protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie*, 922 S.W.2d at 923.

You state Exhibits 3 and 7 and the remaining information in Exhibit 6 consist of communications between employees of the OIG in their capacities as attorneys and attorney representatives, and employees of the city in their capacities as clients and client

representatives. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find Exhibits 3 and 7 and the remaining information in Exhibit 6 consist of privileged attorney-client communications that the city may withhold under section 552.107(1) of the Government Code.

You assert Exhibit 8 is excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining,

deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You assert Exhibit 8 contains internal communications consisting of advice, opinions, and recommendations regarding matters of broad scope that affect governmental policy. Based on your representations and our review, we find that you have established the deliberative process privilege is applicable to some of this information. Therefore, the city may withhold this information, which we have marked, under section 552.111 of the Government Code. However, we conclude you have not established any of the remaining information at issue consists of advice, opinion, or recommendations, or it is purely factual in nature. Accordingly, the city may not withhold any of the remaining information under section 552.111.

Section 552.117(a)(1) of the Government Code may be applicable to some of the remaining information in Exhibit 8. As discussed in part above, section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for individuals who did not make a timely election. We have marked information in Exhibit 8 that the city must withhold if section 552.117(a)(1) applies. However, the city may only withhold the personal cellular telephone number we have marked under section 552.117(a)(1) if it was not provided to the employee at issue at public expense. *See* Open Records Decision Nos. 670 at 6 (2001).

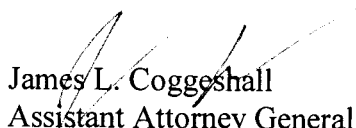
To conclude, the city must release the statutes and ordinances we have marked and the agenda of a public meeting we have marked pursuant to section 551.022 of the Government Code. The city must release the financial disclosure statements we have marked pursuant to section 18-22 of the city's Code of Ordinances; however, in releasing these statements, the city must withhold the information we have marked within them under section 552.117(a)(1) of the Government Code if the employee at issue requested this information be kept confidential under section 552.024 of the Government Code prior to the city's receipt of the requests for information. The city may withhold Exhibits 2, 4, and 5 and the information we have marked in Exhibit 6, which are subject to section 552.022 of the

Government Code, under Texas Rule of Evidence 503. The city may withhold Exhibits 3 and 7 and the remaining information in Exhibit 6 under section 552.107 of the Government Code. The city may also withhold the information we have marked under section 552.111 of the Government Code. The city must withhold the information we have marked in Exhibit 8 under section 552.117(a)(1) of the Government Code if the employee at issue requested this information be kept confidential under section 552.024 of the Government Code prior to the city's receipt of the requests for information; however, the city may only withhold the personal cellular telephone number we have marked under section 552.117(a)(1) if it was not provided to the employee at issue at public expense. *See* Open Records Decision Nos. 670 at 6 (2001). The city must release the remaining information in Exhibit 8 to the requestor.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 480332

Enc. Submitted documents

c: Requestor

(w/o enclosures)